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Mining with Mr. Justice Holmes

*E.F. Roberts**

[I]t is not the countryman who speaks but the *procureur*, the lawyer, who places professional metaphors and theories at his service.

Hippolyte Adophe Taine

For a genuine poet, metaphor is not a rhetorical figure but a vicarious image that he actually beholds in place of a concept.

Friedrich Nietzsche

Mea culpa, mea culpa, mea maxima culpa: I must confess that, in the words of Evelyn Waugh, I do find an unwholesome pleasure in observing the decay of American decorum. It nonetheless occurs to me that an essay affords the opportunity to adopt an anecdotal approach to the law. Anecdotes do not new doctrine build, but there no longer is any paucity of doctrine. The old common law lawyers are being advised to seek salvation in a new church of principled decisionmaking. This may be a particularly hard thing for old sinners to do when the congregations in Cambridge and Chicago are preaching a different brand of the one true faith.

Let us content ourselves to poke around in the ruins of the common law temple in order to appreciate better one of its more remarkable artifacts. Mr. Justice Holmes and his Delphic opinion in *Pennsylvania Coal Co. v. Mahon*¹ remain a matter of some moment.² As is always the case with decisions worth reflecting upon, the adjudicative facts of the case do not provide sufficient data upon which to bottom a serious critique. So let us return to those days of yesteryear and straightaway recognize the peculiar rules of property law that obtained in the Scranton area.

All of us are probably familiar with the notion that the owner of mineral rights may owe some duty of care to support the owner of the fee in his or her surface use of the land. This principle re-

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1. 260 U.S. 393 (1922).

2. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985).

sults in a binary system (the surface estate and the right of support) that can be treated easily in tort law. In Pennsylvania the coal companies had owned vast areas of land. The companies had sold much of this land, reserving not only the coal, but "the right to . . . remove the same without incurring in any way liability for any damage to the surface of said lots, or to any buildings or improvements which may be or have been placed thereon."³ Treating this subject as a part of tort law, most of us in this day and age would discard this reservation, invoking some words about unconscionability or public policy. In Pennsylvania, however, the court treated this reservation within the subject matter of property law. This reservation became known as the "third estate"⁴ because the Pennsylvania court recognized that "three estates may exist in land, the surface, the coal and the right of support, and that each of these may be vested in different persons at the same time."⁵ This peculiar trinitarian approach was to have some practical consequences.

It came to pass that a school district had purchased the surface rights to some of this land and had built a schoolhouse on the parcel. Lest mining under the school cause it to collapse, the district was faced eventually with the need to evacuate the children until the area settled back into a stable condition. This problem led the local authorities to attempt to enjoin mining under the school. It is not too difficult to imagine how the authorities could have put together an argument that subsidence-causing mining presented a threat to the safety of children and thus constituted an enjoined public nuisance. But the Pennsylvania court would have none of it. The coal company owned both the coal and the right to remove it despite subsidence. According to the court,

For practical purposes, the right to coal consists in the right to mine it. An order of the court that the coal or any part of it must remain permanently unmined as a support to the school building *practically takes* such coal from defendant and vests it in the school district. It would *in effect* be a taking of private property for public use without compensation, which the Constitution forbids.⁶

Recall now that the plaintiff was a school district. This meant

3. *Commonweath ex rel. Keator v. Clearview Coal Co.*, 256 Pa. 328, 330, 100 A. 820, 820 (1917).

4. *In re Glen Alden Coal Co.*, 350 Pa. 177, 181, 38 A.2d 37, 39 (1944).

5. *Charnetski v. Miners Mills Coal Mining Co.*, 270 Pa. 459, 463, 113 A. 683, 684 (1921).

6. *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 256 Pa. 328, 331, 100 A. 820, 820 (1917) (emphasis added).

that a simple solution was available to the authorities if they wanted supporting pillars of coal to remain in place. "Unmined coal is real estate, and the school district under its rights of eminent domain by paying for the same can take all of the coal in question which may be necessary to support its building."⁷ But there was also a moral to be drawn from this effort to implicate the Commonwealth in this public nuisance litigation. "Certainly the school district cannot directly take such property without compensation to the owner, neither can it do so indirectly under the police power of the Commonwealth."⁸ Yet all of this reasoning was predicated upon the postulate that because the coal company owned both subterranean estates, its exploitation of both of these rights did not amount to a public nuisance.⁹

The threat that streets might collapse and buildings might fall down anywhere in the increasingly built-up Scranton area was grist for any politician's mill. Given sufficient public outcry, however, it would be remarkable if even statesmen in the capitol could have ignored the problem. The solution came in the form of the Kohler Act,¹⁰ which applied only to Pennsylvania's anthracite coal region and even there only in built-up areas. This statute simply outlawed further mining that would cause *any* subsidence under land improved by buildings or roads. As a result, the coal companies could no longer extract coal from beneath developed communities.

After the enactment of the Kohler Act, at the behest of a homeowner who owned only a surface estate, a Pennsylvania court enjoined the mining of coal that threatened to cause subsidence which might catalyze the collapse of the homeowner's private residence.¹¹ The court reached this result because the state legislature had found that the health and safety of a large number of people was at stake—a situation "properly warranting the exercise of the police power."¹² There was no need for the court to examine whether this proper exercise of the police power constituted an uncompensated taking because "the statute before us is a police measure which does not, *in any true legal sense*, contemplate the taking of private property for public use . . . or the transferring of it

7. *Id.* at 331, 100 A. at 820-21.

8. *Id.* at 331, 100 A. at 821.

9. *Id.* at 331, 100 A. at 820.

10. Act of May 27, 1921, 52 PA. CONS. STAT. ANN. §§ 661-671 (Purdon 1966).

11. *Mahon v. Pennsylvania Coal Co.*, 274 Pa. 489, 118 A. 491, *rev'd*, 260 U.S. 393 (1922).

12. *Id.* at 497, 118 A. at 493.

from one person to another."¹³

Clearly this situation could have affected the safety of a great number of persons. Unlike the case of the school district, eminent domain did not seem to provide an easy answer in this case because it was not clear at all that the eminent domain power could be used to transfer the coal from the companies' ownership to the private ownership of the area's surface dwellers.¹⁴ Yet the court in the school case had said that no public nuisance existed to justify the need for a remedy bottomed on the police power. However, that particular notion of the law had been "effectively overruled by those who have the right to declare the public policy of the State."¹⁵ Thus, the legislative finding that a public nuisance obtained, a set of words akin to a talisman, worked jurisprudential magic.

If you start with the image of injured persons and the need to do something and if you have been accustomed to thinking about the scope of the eminent domain power in a conservative way, the police power does appear to have been the answer to the Scranton problem. The end sought to be achieved was safety and the means were reasonably adapted to putting an end to the threat to safety. As a result, the companies could not mine their coal; it could be said that this was *tantamount* to having it taken away from them. So what? That was an old chestnut if one recalled the brewer who had been unable to use his plant after Kansas went bone dry and prohibited even the manufacture of intoxicants in-state. The brewer had tried to argue that this prohibition on use constituted an uncompensated taking. Justice Harlan the Elder, however, informed the brewer that the fact of the matter was that he was still in possession of his plant; *ergo*, it hardly could have been taken away from him. This was the teaching of *Mugler v. Kansas*.¹⁶ Indeed, when the Kohler Act came before the Supreme Court, Mr. Justice Brandeis had no difficulty sustaining the Act's constitutionality. The state could invoke its police power to checkmate a threat to the public safety, and the coal remained in the possession of the coal company.¹⁷ What was the problem? "Every restriction

13. *Id.* at 498, 118 A. at 493 (emphasis added).

14. Worth reading sometime is the relatively recent decision by Judge Alarcon in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub. nom.* *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984).

15. *Mahon*, 274 Pa. 489, 500, 118 A. 491, 494.

16. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

17. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J.,

upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the State of rights in property without making compensation."¹⁸ But Justice Brandeis was speaking only for himself in his dissenting opinion in *Pennsylvania Coal Co. v. Mahon*.

What if one began instead by looking at the right to support as an estate itself? More accurately perhaps, let us think of it as a right not to support. This right existed in full flower, howsoever evil, before the Kohler Act, but disappeared entirely from the urban scene upon the enactment of the Kohler Act. Thus, that Act "purports to abolish what is recognized in Pennsylvania as an estate in land."¹⁹ Absent that estate, the coal could not be mined and the coal was rendered useless. But while the coal was then of no use to the coal company, it became the pillar supporting the community and, perforce, was useful to the community. Thus, by abolishing the third estate, the Act gave the community the very thing it did not have before, and at no cost. The community could have had its pillar by condemning *and* paying for it. By invoking the police power, however, the community accomplished the same result at *no cost* to itself but at some little cost to the coal companies. If this can be done, "the natural tendency of human nature"²⁰ being what it is, the public in similar situations always will resort to the police power in lieu of the eminent domain power and the institution of private property itself will be in jeopardy. Or so thought Mr. Justice Holmes, who spoke for the Court in *Pennsylvania Coal Co. v. Mahon*.²¹

True it is that "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."²² The "petty larceny of the police power"²³ is just something with which one has to live. But what of highway robbery? Police power can be unleashed whenever the public health, safety, or morals are at risk, which suggests that there is no due process clause antidote. But

dissenting).

18. *Id.*

19. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

20. *Id.* at 415.

21. *Id.*

22. *Id.* at 413.

23. It appears that a week before the *Pennsylvania Coal Co. v. Mahon* decision Justice Holmes deleted this interesting phrase from one of his opinions. See 1 HOLMES-LASKI LETTERS 457 (M. Howe ed. 1953).

clearly there was, given the then existent dogmas associated with substantive due process. Just as clearly, if we are met with Mr. Justice Holmes, notions of substantive due process are out of bounds. He appears to be hoist on the petard of his dissent in *Lochner v. New York*.²⁴ But then the due process clause does impose as checkmates against states the fundamental clauses of the Bill of Rights that originally had been calculated to control the behavior of the federal government. "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."²⁵ Whence we might quickly enough arrive at the conclusion that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²⁶

The question today, of course, is whether Mr. Justice Holmes meant to say that an actual uncompensated taking existed here, in which case the fifth amendment was implicated in its own right, or whether something so close to an actual uncompensated taking was present that the use of the police power was arbitrary and, perforce, a violation of the due process clause. Holmes almost had to rely on the fifth amendment if he was not going to be guilty of crafting a decision bottomed on some notion of substantive due process inherent in the due process clause. It is my impression that Holmes did not mean to invent a clever way around the problem of invoking substantive due process. It was not reform that he was against; it was the unfairness in the selection of the means of achieving reform that excited his ire. He did see that reform could work robbery on occasion. The language he used suggests that Mr. Justice Holmes meant to explode the notion that an actual entry was required before a taking occurred. Ploys such as that suggested by *Mugler v. Kansas*, he thought, ought to be recognized for what they in reality were: ratiocinations masking uncompensated takings.²⁷

In retrospect, it would have been helpful had Mr. Justice

24. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."). I must admit that I suggested something of this very sort in E. ROBERTS, *THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND* 30 (1982).

25. 260 U.S. at 415.

26. *Id.*

27. 1 HOLMES-LASKI LETTERS 473 (M. Howe ed. 1953) ("I fear that I am out of accord for the moment with my public-minded friends . . . I always have thought that old Harlan's decision in *Mugler v. Kansas* was pretty fishy.").

Holmes expanded upon the technical side of his opinion. But I suspect that Holmes had bigger fish to fry. He was concerned with the institution of private property in the then emerging world of the regulatory state. The police power comes close to being a universal solvent; there is no container in which it can be encapsulated. Witness how the brewery in Kansas or the estate here could be destroyed as long as the state could justify the measure in terms of health, morals, safety, or general welfare. The police power, moreover, is free: no money need be paid and no taxes need be assessed to raise money. The brewer or the coal company must rely on the politicians to see the fairness in their argument that the public at large should pay the costs of progress and thus, the state should use the eminent domain power rather than its police power. Precisely at this point Justice Holmes' views of human nature suggested that the political protection of property was a nonstarter. Property is safe from the masses only insofar as the restraint upon the exercise of the police power is a legal one, nay, a constitutional one.

This is not to say that Mr. Justice Holmes, like the advocates of substantive due process, would have erected a constitutional barrier making socialism legally impossible. That is not the point at all. The point is that a few owners of property, as in *Pennsylvania Coal Co. v. Mahon*, are always at the mercy of a quick, free fix. Their estates, as it were, are blown up in order to stop the spread of whatever social fire the legislature is determined to halt. Their property is destroyed for the good of the many. The point is one of fairness: why shouldn't the public sometimes bear the costs of progress when only one or two owners of property are about to be sacrificed for the common good? No reform is impossible; it is simply a question of whether the use of the police power or the power of eminent domain is more appropriate in a given situation. That is to say, the "question at bottom is upon whom the loss of the changes desired should fall."²⁸ But that question cannot be left to the politicians, given human nature. It must instead be left to the judges, and this is precisely what Justice Holmes did.

Vague stuff? Yes indeed, it is vague because Mr. Justice Holmes did not have a test for when throwing the cost of collective progress on the few became indecent. It was a "question of degree—and therefore cannot be disposed of by general proposi-

28. 260 U.S. at 416.

tions."²⁹ The idea is simply that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³⁰ But one should not miss how radical all this was in retrospect. Justice Holmes assumed that, given a public purpose, the authorities could use their power of eminent domain. Presumably, Holmes would not have understood why either *Berman v. Parker*³¹ or *Hawaii Housing Authority v. Midkiff*³² raised a problem at all. In point of fact, he seems to have anticipated Mr. Justice Douglas' axiom that the state can adopt a socialist economy as long as it pays for the private property it is converting to public use.³³

As long as a court is striking down a statute, it makes little difference whether the court voids it under the just compensation clause or under the due process clause. But, should the property owner stop to think for a moment that the statute constituted an actual taking during the time the now void enactment was in force, he might think further to claim damages in inverse condemnation for this temporary taking. Costs would be involved whenever a governmental organ overstepped the bounds of its police power authority. This refinement of the issues in *Pennsylvania Coal Co. v. Mahon* arose precisely at a time when environmentalists were pushing the police power to its extreme limits. Indeed, some saw this as the fulfilment of the argument made by John W. Davis, Esquire, on behalf of the Pennsylvania Coal Company. Here was a "class . . . of laws passed at the insistence of a determined and organized minority, designed to confiscate for their benefit the rights of producers of property, and passed by a legislature in time of political stress, in its anxiety to secure the votes controlled by the advocates of the measure."³⁴

Recent cases decided in two states have not been without interest. It had been conventional wisdom in New York that, given a

29. *Id.*

30. *Id.* at 415.

31. 348 U.S. 26 (1954) (Court upheld constitutionality of an Act of Congress enabling the District of Columbia Redevelopment Land Agency to "acquire and assemble, by eminent domain . . . , real property for 'the development of [slums and ghettos] in [the city].'" *Id.* at 29).

32. 467 U.S. 229 (1984) (Court upheld state act giving state agency authority to force compulsory arbitration and sale between landowners and lessees. The purpose of the act was to break up the land oligopoly in Hawaii).

33. Cited in *Commonwealth v. Rosso*, 95 P.R. 488, 527 (1967), *appeal dismissed per curiam*, 393 U.S. 14 (1968).

34. 260 U.S. at 396.

nuisance, the neighbors had a right to an injunction and that there would be no nonsense about leaving them with only money damages on some theory of balancing the interests. In the very month of the first Earth Day, New York's highest court retreated from this doctrine and left some neighbors of a dust-emitting cement plant with money damages and without an injunction. This case of *Boomer v. Atlantic Cement Co.*³⁵ has become a staple of the casebook industry. Judge Jasen chose to dissent in *Boomer*, basing his objection on the interesting theory that, given the cement company's new "right" to fob the neighbors off with money damages, the company had in effect been given the power of inverse condemnation to lay easements of cement dust across the lands next door. This power, suggested Judge Jasen, had to be unconstitutional in the instance of a private company.³⁶

It came to pass in New York that a municipal sewer plant caused an awful stink that damaged a neighboring motel business. Again, the litigation resulted in a levy of money damages. But now the question became one of determining the rate of interest the municipality owed on the sum it had to pay. For torts, which generally include the concept of nuisance, the rate of three percent was the rule, but for damages attributable to the exercise of inverse condemnation, six percent would obtain. The court in *Tom Sawyer Motor Inns, Inc. v. County of Chemung*³⁷ affirmed the application of the six percent formula in a memorandum opinion. But now both Judge Breitel and Judge Jasen objected because the case involved a nuisance suit, pure and simple, and therefore was not an illustration of inverse condemnation. Any reference to inverse condemnation in the *Boomer* case "was at best a *metaphor* to emphasize the dissenter's view that a private corporation was *in effect* being granted a power of appropriation in eminent domain."³⁸

Here indeed we do run across one of those turning points in the law's unsteady progress. Soon enough Chief Judge Breitel was employing the notion of metaphor to put an end to the idea that a landowner could be the victim of a temporary taking during the interval between the enactment of an ordinance and its invalidation as a "taking." Thus, in *Fred F. French Investing Co. v. City of*

35. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

36. *Id.* at 230-31, 257 N.E.2d at 876, 309 N.Y.S.2d at 321 (Jasen, J., dissenting).

37. 32 N.Y.2d 775, 298 N.E.2d 120, 344 N.Y.S.2d 958 (1973).

38. *Id.* at 777, 298 N.E.2d at 120, 344 N.Y.S.2d at 958 (emphasis added).

New York³⁹ Judge Breitel warned that the "metaphor should not be confused with the reality"⁴⁰ because as he read the cases (including *Pennsylvania Coal Co. v. Mahon*) not one of them involved an actual taking under the eminent domain power. Each case must necessarily have been decided under the due process clause. But while this might be the right answer for the moment in New York, victims of regulations struck down in other jurisdictions also were beginning to claim an entitlement to compensation for the temporary "taking" inflicted upon them during the life of the regulation. Because their entitlement rested upon a fifth amendment claim, the ultimate answer about the merits of the idea had to come from Washington. But Washington thus far has been coy.⁴¹

Justice Blackmun has pointed out that before worrying whether compensation need be paid for the interval before a court strikes down a regulation as confiscatory, one might show some concern that the litmus for marking the point at which a regulation actually goes "too far" has yet to be invented.⁴² Two recent cases from New Hampshire may suggest that, to invoke Professor Haar's *bon mot*, this is indeed the "lawyer's equivalent of the physicist's hunt for the quark."⁴³ In *Sibson v. State*⁴⁴ the state's high court sustained new controls over coastal wetlands that took away the rights of property owners to develop the wetlands. The new controls survived because the state had imposed this regulatory system precisely in order to protect a valuable part of the marine ecological system. Six years later in *Burrows v. City of Keene*⁴⁵ the same court held that a local government's effort to put a parcel of land into a conservation district constituted a taking, notwithstanding the fact that the municipality had acted in order to preserve open space. The court even went further in *Burrows* and adopted the idea that the landowner was entitled to compensation for the intervening taking. Here is an apparent contradiction worth mulling over.

While the landowner in *Sibson* already had recouped his in-

39. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976).

40. *Id.* at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9.

41. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985).

42. *Id.* at 3123-24.

43. C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976).

44. 115 N.H. 124, 336 A.2d 239 (1975).

45. 121 N.H. 590, 432 A.2d 15 (1981).

vestment by selling most of the property, the court dealt with the case as if only his last four acres of marshland were involved. If the landowner was allowed to fill this area, he would do serious damage; but if he was not allowed a permit to fill in the marsh, he would be left with land of practically no pecuniary value. Counsel for the state argued that the court should take this opportunity to reject entirely *Pennsylvania Coal Co. v. Mahon's* applicability to instances when regulations were imposed to prevent a landowner from using his property in a way that would harm the environment, regardless of the regulation's potential to destroy the entire value of the property.⁴⁶ In short, counsel advocated a return to the world of *Mugler v. Kansas*.⁴⁷ The court rehearsed this theory without rejecting it, citing *Mugler* favorably. Nevertheless, the court held that the regulation was appropriate, finding that it had not gone too far even under the *Pennsylvania Coal Co. v. Mahon* doctrine because the new regulatory system did not destroy the value of the estate. It remained as valuable as it had always been as a scene of aquatic activity and any speculative value was beside the point because no one has the right to reap speculative gains at the expense of the commonweal.⁴⁸

Particularly interesting about *Sibson* is the fact that the counsel for the state believed that "two ingredients" were crucial to the result. These ingredients were "a state statute that clearly articulated the harm that would result in the event the protected lands are damaged, and a record of expert testimony demonstrating that the concern expressed by the Legislature is indeed real."⁴⁹ But counsel added a very definite practical point about the feasibility of any scheme bottomed on compensating the owners of these ecologically valuable lands. "The economic cost to New Hampshire of preserving 5,000 acres of saltmarsh alone could cost in excess of 50 million dollars, at current market values. New Hampshire cannot afford that economic burden. Neither can New York, New Jersey, or any other state."⁵⁰

One must wonder whether the ghost of Holmes smiled sardonically if and when it encountered that last statement. One does know that the result in *Sibson* did draw a Holmes-like dissent

46. *Sibson*, 115 N.H. at 127, 336 A.2d at 241.

47. *Id.* at 128, 336 A.2d at 242.

48. *Id.* at 129-30, 336 A.2d at 243.

49. Stever, Jr., *What Rights?* in *THE SEVERE RESTRICTION OF DEVELOPMENT* at 65, 77 (R. Bartels et al. eds. 1977).

50. *Id.* at 67.

from Judge Grimes, who had his own pre-Holmesian source to cite.

I am in complete sympathy with those who wish to preserve the marshes. However, I continue to agree with Judge Smith when over one hundred years ago he said that great public benefit "may afford an excellent reason for taking the plaintiff's land in a constitutional manner but not for taking it without compensation."⁵¹

The court in *Sibson* excepted zoning cases from this apparent return to the *Mugler v. Kansas* approach. As chance would have it, the court soon had to deal with a zoning case, and Judge Grimes had the opportunity to author the opinion. In *Burrows v. City of Keene*⁵² the city authorities wanted to purchase a developer's parcel in order to keep it open space, but the money the city had to offer did not even approach the market value of the parcel. The developer unsuccessfully attempted to obtain residential subdivision approval from the local planning board. The facts suggest that the planning board was more interested in the idea that the city should have been able to purchase the applicant's land somehow than the board was in the developer's actual application to develop it. No sooner did the developer march off to seek relief in equity than the city amended the zoning in the area to put the tract into conservation and rural zones which, according to the trial court, were "economically impracticable" and deprived the developer of "any worthwhile rights or benefits in the land."⁵³

The authorities may have been persuaded that "the environment" was the name of the game and that *Sibson* justified their approach. Open space, like a sound marine environment, does better the general welfare, and thus, the state or city can employ the police power properly to protect what remains of open space in urban areas. Grimes, however, did not rely on *Sibson*, a case that involved land of a "unique nature."⁵⁴ The case at hand implicated land, the development of which was perfectly natural in the normal order of things. The development of this land would result in no harm to the public. What was involved was an effort "to give the public the benefit of preserving the . . . land as open space."⁵⁵

It would appear that Judge Grimes did not think that the lo-

51. 115 N.H. at 130, 336 A.2d at 243. (Grimes, J., dissenting) (quoting *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 518 (1872)).

52. 121 N.H. 590, 432 A.2d 15 (1981).

53. *Id.* at 601, 432 A.2d at 21.

54. *Id.*

55. *Id.*

cal authorities had gone a little too far in asserting the rights of the public. Rather, it is clear that he thought that this was not just another case of petty larceny, but one of highway robbery. "Planners and other officials," he warned, "should be aware of possible personal liability for bad faith violations of a landowner's constitutional rights which may go beyond the damages recoverable for inverse condemnation."⁵⁶ Meanwhile, the "allowance of damages for inverse condemnation during the period of the taking . . . should encourage such officials to stay well on the constitutional side of the line."⁵⁷

What is interesting is the language that Grimes used. Absent damages for any temporary takings, "municipal planners and other public officials" will be encouraged "to throw the burdens accompanying 'progress' upon individual landowners rather than on the public at large."⁵⁸ *Planners* and *progress* are suspect, at least at the level of local government. But peculiarly enough, this calls to mind another case featured in most land use planning casebooks. Cognoscenti will recall the plight of the landowner in *Hadacheck v. Sebastian*,⁵⁹ who was economically decimated when the city outlawed the manufacture of bricks on the site of his in-town clay pit. Worth recalling is the language of Mr. Justice McKenna when he discussed the nature of the police power:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily *There must be progress, and if in its march private interests are in the way they must yield to the good of the community.*⁶⁰

Something about the cadence of this statement almost makes one suspect that none other than Mr. Justice Holmes had a hand in its composition. Holmes was, after all, a member of the court that decided *Hadacheck*.⁶¹

One now has to recall that the scope of the police power begs description. Indeed, its parameters are only set by a dialectician's ability to articulate a general welfare purpose for its exercise.⁶²

56. *Id.* at 599, 432 A.2d at 20.

57. *Id.*

58. *Id.*

59. 239 U.S. 394 (1915).

60. *Id.* at 410 (emphasis added).

61. See F. RODELL, NINE MEN 187 (1955) ("McKenna was to become a sporadic spokesman against vested property interests under Holmes's tutelage . . .").

62. Consider the result of Justice O'Connor's handiwork in *Hawaii Housing Authority*

There is no reason to doubt that a state may use its police power, for example, to guarantee that space be left free from development in urban areas. The problem is that this recognition of the need to preserve open space may destroy the dreams of certain landowners. Why should they be left out of the development process? Put another way, why were they not fortunate enough to have developed their property before the city or state recognized a need to maintain some open space? Why should they foot the bill for progress? But why should the owners of tidal marshlands foot the bill for progress? Chance rules the affairs of mankind and chance likewise seems to dictate when judges will cry foul and discern a taking, a case in which the public ought to pay the cost. But what is the test for when the judges, *qua* referees, will signal foul?

If the question were truly a legal one, then one could hope for a test. Law, after all, is the realm of reason and there must be an intellectual litmus for every question. But, as my English colleague Theodore Ursus is wont to insist, the problem is one of self-created hardship because Americans insist on transposing essentially political questions into legal ones. Ursus suggests that the question is merely one of fairness, but notions of what is fair will of necessity vary somewhat with the facts of any case and with the times. Still, given a Parliament occupied by gentlemen instilled with a sense of fair play, over the long run there should be a discernible norm. However, gentlemen also would understand that this norm could never be made precisely articulate. It would, in fact, be folly to try to reduce the norm to a normative.

I gather that my English friend really means to suggest that this is very much like the concept of collegiality, an idea much mooted of late in some law schools as a factor to be used in evaluating novice teachers. Once you begin to discuss the meaning of collegiality, collegiality is dead. Maybe there is something to this notion if one goes back and reads again Justice Holmes' decision in *Pennsylvania Coal Co. v. Mahon* and his refusal to be drawn into setting precise boundaries defining the taking concept. But a moment's reflection ought to bring home the futility of following up this line of thinking. The world of elites and shared unstated val-

v. Midkiff, 104 S. Ct. 2321, 2329-30 (1984): "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers. . . .

. . . .
[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."

ues no longer obtains in this country.

This may suggest that today's notion of fairness might be left to the political process wherein elected assemblies reflect all of the disparate groups in society and wherein, presumably, some common denominator of fairness can be arrived at by consensus politics. Indeed, one is reminded of the Supreme Court's recent efforts to discern a principle of decisionmaking which would immunize local governments in the performance of their sovereign functions from the reach of the commerce power. Unable to find a litmus, the Court in *Garcia v. San Antonio Metropolitan Transit Authority*⁶³ left the cities to the tender mercies of Congress and the political process.

This is precisely the point at which one might invoke Mr. Justice Holmes to shed some light on these musings. Congress is not the same as a state legislature. Holmes, after all, did "not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states."⁶⁴ One might argue then that the basis of Justice Holmes' position was his distrust only of state legislatures. But no; *Pennsylvania Coal Co. v. Mahon* teaches that the owners of private property may not be safe from unfair play if the several states are given the final authority and responsibility to rein in their own police power, and this distrust by implication includes the judicial as well as the legislative and executive branches of state government.

Thus, the real problem behind any reconsideration of the doctrine of *Pennsylvania Coal Co. v. Mahon* is whether state governments can be trusted to decide fairly whether the taxpaying public at large or private property owners ought to bear the cost of progress. Absent a belief that the Court is privy to some sacerdotal notion of fairness that has not been generally revealed and that the justices refuse to reveal to the public, the whole taking concept may appear to be an anachronism, a piece of paternalism left over from a day and age when legislatures were not fairly constituted reflections of the public at large and state courts were sometimes suspect. All of this suggests that a return in Washington to the approach of *Mugler v. Kansas* might be in order. This would allow the several states to elect whether to achieve reform by way of the

63. 105 S. Ct. 1005 (1985).

64. *Law and the Court*, in *COLLECTED LEGAL PAPERS* at 291, 295-96 (1921).

police power or the eminent domain power and, further, to elect whether to leave the final review of that choice to the legal process or to the political process. In short, one could advocate a scaled-down version of the late Chairman Mao's approach to the cultural revolution and advocate the idea that fifty flowers should be let bloom.

The one difficulty with this notion of pluralism may lie in the palpable fact that the economy is becoming one nationwide phenomenon. If one thinks of the rules governing usury, due on sale clauses, or land use in flood plains, for example, it may become clear that the rules governing transactions in real estate are being federalized piece by piece. This results from the developing notion of a national economy, possibly one fighting for its survival against other national economies in a very Holmesian world. Real estate is a major piece upon this ultimate economic monopoly gameboard as it were. The notion that local quirks might upset the calculations of actors and investors participating in a national economy is absurd. Whatever security *Pennsylvania Coal Co. v. Mahon* promises the investor in real estate nationwide, it is not going to wither away.

But is there merit to the notion that, given a "taking" by state or local legislation, an owner of real estate is entitled to some sort of dollar relief for the intervening imposition of controls? Assuming that "the authorities" do represent their constituents or, conversely, that people get the governments that they deserve, we are talking about a claim against a state or a municipality—a sovereign as it were—and not against the individuals involved. We are not talking civil rights. Instead, we are asking whether, given that a "taking" has occurred, the victim thereof is entitled to collect some compensation on a theory of inverse condemnation for the "easement" that the public has imposed across his or her estate.

One can see merit in the notion that granting damages for inverse condemnation will "chill" inventiveness by planners trying to create the ideal habitat of the future.⁶⁵ Democratic instincts, however, may suggest that there is a great deal of sense in Justice Brennan's ipse dixit that "[a]fter all, if a policeman must know the Constitution, then why not a planner?"⁶⁶ If one were to plot the way questions were decided across some sociological map in terms

65. See, e.g., Williams, Jr., Smith, Siemon, Mandelker, & Babcock, *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984). But note the "guild" interest in this position.

66. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

of a "which way the wind is blowing" schemata, odds may favor the imposition of liability upon the community responsible for the erroneous decision. After all, phrases such as "sovereign immunity appears to be dead;" "victims are entitled to be made whole whether or not at fault themselves;" and "no one should lose out to chance" appear to be propositions that may describe contemporary society. These rules of thumb do not explain results, but they may suggest which way the wind is blowing. The wind from the east, or wherever, does seem to incline in favor of collective rather than individual liability.

Therefore, if I had a shilling to bet, I might be inclined to place it on the square marked for the imposition of intervening liability in "taking" cases. That only suggests that I might have class prejudices in favor of policemen and against *haute bourgeoisie* planning types. But how, I wonder, would Mr. Justice Holmes decide the issue were he given the chance to do so today? That is precisely the kind of question which makes academic life worth living. It has *no right answer*! Neither "the market" nor *Das Kapital* bound in Gucci leather promises to reveal THE truth. We are all free, as it were, to speculate upon the matter.

I suspect that, given a case when the public has yet again regulated one or two other persons into the posture of maintaining a public park of some sort at their private loss, be it an odd piece of marshland or a rare parcel of quasi-agricultural land, Justice Holmes would vote "to shoot" a few planners to set an example for the rest. Life *does* entail harsh results now and then. "If we want conscripts, we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe."⁶⁷ Learning comes hard. As the regulations affecting land increase, as the regulatory state anticipated by Justice Holmes comes into its own, and as the number of authorities able to regulate land increases almost exponentially, so too does the threat increase that the scenario rehearsed in *Pennsylvania Coal Co. v. Mahon* will repeat itself.

Frankly, I cannot envisage Mr. Justice Holmes much interested in granting mercy to contemporary society before he ordered its functionaries decimated.

I have heard the question asked whether our war was worth fighting, after all. There are many, poor and rich, who think that love of country is an old wife's tale, to be replaced by interest in a labor union, or, under the name of cosmo-

67. *Ideals and Doubts*, in COLLECTED LEGAL PAPERS at 303-04.

politanism, by a rootless self-seeking search for a place where the most enjoyment may be had for the least cost.

. . . From societies for the prevention of cruelty to animals up to socialism, we express in numberless ways the notion that suffering is a wrong which can be and ought to be prevented, and a whole literature of sympathy has sprung into being which points out in story and in verse how hard it is to be wounded in the battle of life, how terrible, how unjust it is that any one should fail.

. . . For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine.⁶⁸

I believe that Mr. Justice Holmes really did believe that there was a moral lesson inherent in his decision in *Pennsylvania Coal Co. v. Mahon*. If necessary, I cannot help but believe that he would inflict casualties in order to drive home that lesson. "The true teaching of life is a tender hardheartedness which has passed beyond sympathy and which expects every man to abide his lot as he is able to shape it."⁶⁹

68. O. W. HOLMES, *The Soldier's Faith*, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 73, 74-75 (M. Howe ed. 1962).

69. O. W. HOLMES, *Admiral Dewey*, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 109, 110 (M. Howe ed. 1962).